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November 22, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Salas  
Secretary  
Federal Communications Commission  
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Filing Counter - **TW-A325**  
445 - 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

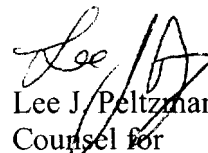
Re: MM Docket No. 88-577  
Biltmore Forest, North Carolina  
Liberty Productions, a Limited Partnership  
BPH-870831MI  
Opposition to Amendment

Dear Ms. Salas:

Transmitted herewith, on behalf of Orion Communications Limited, applicant in the above-referenced Commission proceeding, is an original and fourteen (14) copies of its Opposition to Amendment filed by Liberty Productions, a Limited Partnership.

Please contact the undersigned in the event the Commission has any questions with respect to this Opposition filing.

Sincerely,



Lee J. Heltzman  
Counsel for

ORION COMMUNICATIONS LIMITED

Enclosure

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS,	)	File No. BPH-870831MI
A LIMITED PARTNERSHIP	)	
	)	
WILLSYR COMMUNICATIONS	)	File No. BPH-870831MJ
LIMITED PARTNERSHIP	)	
	)	
BILTMORE FOREST	)	File No. BPH-870831MK
BROADCASTING FM, INC.	)	
	)	
SKYLAND BROADCASTING	)	File No. BPH-870831ML
COMPANY	)	
	)	
ORION COMMUNICATIONS	)	File No. BPH-870901ME
LIMITED	)	
	)	
For a Construction Permit for a New	)	
FM Broadcast Station on Channel 243A	)	
at Biltmore Forest, North Carolina	)	

To: The Commission

**OPPOSITION TO AMENDMENT**

Orion Communications Limited ("Orion"), by its counsel, hereby opposes the Amendment filed on November 10, 1999 by Liberty Productions, a Limited Partnership ("Liberty"). In support of its position, Orion submits the following:

**I. FACTUAL BACKGROUND**

**(a) Liberty's Disqualification for Lack of Character and Lack of a Transmitter Site**

1. Liberty was disqualified in the hearing conducted in this proceeding on separate grounds. The Presiding Administrative Law Judge who conducted the hearing and observed the witnesses found that Liberty never had any reasonable assurance that the

transmitter site specified in its application was available to it<sup>1</sup> and that when Liberty's general partner, Valerie Klemmer, certified to the Commission that Liberty had a transmitter site, "she had absolutely no basis for doing so."<sup>2</sup> After observing Ms. Klemmer testify at hearing, the Presiding Judge concluded that, in certifying to Liberty's transmitter site's availability, Ms. Klemmer had "hoped to bluff it out" but that, "fortunately (from the public interest standpoint), she got caught."<sup>3</sup> In her testimony, Valerie Klemmer "blatantly dissembled in a manner that doesn't befit a prospective broadcast permittee."<sup>4</sup> Thus, Liberty was disqualified both because it lacked any transmitter site and because of Valerie Klemmer's misrepresentations about Liberty's transmitter site's availability. Liberty was held to lack the requisite character qualifications to be a Commission licensee.<sup>5</sup> Orion was declared to be the best applicant and was awarded the construction permit.

**(b) The Commission's Attempt to Adapt a Fair Auction Process for Hearing Applicants**

2. In concluding that it would use auctions instead of comparative hearings to resolve pending hearing cases that had not settled, the Commission stated that parties to these

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<sup>1</sup> National Communications Industries, 5 FCC Rcd 2862, 2866 (Adm. L.J. 1990).

<sup>2</sup> Id., 5 FCC Rcd at 2867.

<sup>3</sup> Id. Unfortunately, when the Presiding Judge found that, from "the public interest standpoint," Liberty got caught, he had no idea what subsequently would transpire in this proceeding. The Presiding Judge's judgment that Orion was the best qualified applicant and that Liberty was unqualified to be a Commission licensee was rendered solely on his consideration of where the public interest lay. This should be contrasted with the Commission's present decision, in which a Commission decision finding Liberty qualified and awarding it the Biltmore Forest construction permit will result in the FCC being rewarded with substantially more money since Liberty was the high bidder at auction. This is not merely a theoretical possibility since a review of past Commission auctions shows that not once has the Commission ever disqualified a high bidder.

<sup>4</sup> Id. at 2879

<sup>5</sup> Id. at 2867, 2879.

comparative cases would not be prejudiced since “pending applicants will be bidding only against the competing applicants that have spent the same amount of time, and presumably incurred similar expenses, in prosecuting their applications through a comparative hearing.”<sup>6</sup> The Commission reasoned that pending applicants, like Orion, would allegedly not be unfairly disadvantaged in an auction as a result of having expended large amounts of money to secure the Biltmore Forest license since the auction would be a closed one restricted only to those competing applicants. Thus, the Commission concluded that it expected that “the price ultimately paid for the license [would] reflect the expenditures incurred by all qualified bidders in prosecuting their long-pending applications.”<sup>7</sup>

3. With respect to those applicant-bidders, the Commission made it clear that it would require the reporting of any changes in the applicant ownership structure required by the FCC’s disclosure standards. Those disclosure standards were amended in a recent Memorandum, Opinion and Order, released August 5, 1999, wherein the Commission stated that it would attribute the media interests held by an individual or entity whose interests in the applicant-bidder, aggregating both debt and equity holdings, exceeded thirty-three percent (33%) of the total asset value of the bidder.<sup>8</sup> The Commission represented that it was concerned about bidder manipulation of the eligibility standards for a new entrant bidding credit. According to the Commission, “attributing the media interests held by very substantial investors would prevent a large media group owner from providing all the financing for an auction applicant”

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<sup>6</sup> First Report and Order in MM Docket No. 97-234, 13 FCC Rcd 15920, 15941 (1998) (“Auction Order”).

<sup>7</sup> Id.

<sup>8</sup> Memorandum Opinion and Order in MM Docket 97-234, FCC 99-201, released August 5, 1999, paras. 5, 9 (“Attribution Auction Order”).

claiming new entrant status and eligibility for the substantial bidding credit.<sup>9</sup> Because substantial investors would “have a realistic potential to influence bidders claiming new entrant status,” the Commission felt obligated “to consider the media interests held by very substantial investors in, and creditors of, auction applicants seeking new entrant status.”<sup>10</sup> The adoption of this stricter attribution standard was justified, in substantial part, in order to insure fairness to competing bidders and the public.<sup>11</sup>

**(c) Liberty’s Structure Undergoes a Change**

4. On the eve of the auction, Liberty reported that it had entered into a Loan Agreement with Cumulus Broadcasting, the nation’s third largest owner and operator of broadcast stations with literally hundreds of stations under its control. On November 10, 1999, Liberty amended its application to report that on September 10, 1999, it had entered into a Loan Agreement with Cumulus and that the proceeds of that loan would exceed thirty-three percent (33%) of the total asset value of Liberty. The Cumulus-Liberty Loan Agreement has been amended since September 10. Liberty declared in its amendment that the Loan Agreement, as amended, did not provide Cumulus with an option to acquire Liberty’s Biltmore Forest permit or the ability to broker time on the Station. However, Liberty did not declare whether the Loan Agreement, as initially entered into on September 10, 1999, provided such an option or a right to broker programming time and did not supply the Loan Agreement or the amendment in its filing.<sup>12</sup> According to Liberty, its limited partner, David T. Murray, who holds a sixty-five

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<sup>9</sup> *Id.*, para. 6.

<sup>10</sup> *Id.*, para. 7.

<sup>11</sup> *Id.*, para. 8.

<sup>12</sup> It is unknown whether Liberty has supplied its Loan Agreement or amendment to the Commission for its review on an *ex parte* basis. If so, the Commission must immediately furnish these documents to the other Biltmore Forest applicant-bidders for their review. As the payee,

percent (65%) equity interest in Liberty, has not made an equity contribution exceeding thirty-three percent (33%) of the total asset value of Liberty and has not communicated with general partner, Valerie Klemmer, since 1990, raising a question whether Mr. Murray has been replaced by the large media group owner. Cumulus.

## II. ARGUMENT

5. Like its previous disqualification, Liberty's amendment is improper and unacceptable on more than one ground. First, Liberty seeks to amend to a new tower site despite the fact that it never possessed an available site and misrepresented its claim to one. While it is true that the Commission did not expressly affirm the conclusion of the Presiding Judge that Liberty was disqualified on character grounds, that was only because Liberty was such an inept applicant that it was not necessary for the Commission to make this additional conclusion.<sup>13</sup>

6. This case marks the first opportunity for the Commission to consider the applicability of its new broadcast auction rules to an amendment offered by an applicant which never had a site and then lied about its lack of a site at hearing. The Commission has stated that it will resolve site issues in resumed hearing proceedings only to the extent that they involve a question of false certification. However, this case involves an applicant who has filed an amendment to relocate from a site which it never had in the first place. The Commission can hardly find Liberty qualified merely because it is willing to pay more money to the Commission than the other Biltmore Forest applicants. The Commission should not grant dispensations to unqualified applicants based on their financial offerings. Liberty was unqualified at the time it

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the Commission is hardly the proper functionary to determine on its own without input from any other party concerning whether the loan documents offered by a payor held to lack requisite character qualifications are in compliance with stated Commission procedures.

<sup>13</sup> National Communications Industries, 7 FCC Rcd 1703 (1992).

filed its application, was unqualified in 1990 when the Presiding Judge rendered his Initial Decision, and is similarly unqualified now. As such, there is no basis for accepting any site change amendment.

7. Additionally, Liberty's amendment is unacceptable on the separate ground that it attempts to bring in as a substantial investor one of the largest broadcasters around, while arrogantly still seeking a new entrant bidding credit. Moreover, Liberty, while proclaiming that Cumulus has no attributable interest in its application, steadfastly refuses to file either its Loan Agreement or the amendment to its Loan Agreement with Cumulus. The Commission previously took great pains to justify its switch to an auction based in large part on the fact that the Biltmore Forest and similar auctions involving hearing applicants would be closed and that pending applicants would be bidding only against other competing applicants. Yet, in this case, far from being a closed auction, Liberty has secured the financial assistance of one of the largest broadcasters in the world. The Commission cannot have it every way. If these auctions are truly closed, then the Commission can hardly permit one of the bidders to be funded by a large media group owner to the detriment of the other applicants. This large media group owner would "have a realistic potential to influence" Liberty.<sup>14</sup> What has occurred here is the very manipulation of the process which the Commission claimed that it was attempting to root out in its August 5, 1999 Attribution Auction Order. The same fairness to competing applicants and the public, which the Commission claimed was the basis for its adoption of a stricter attribution standard limiting applicant eligibility for a new entrant status, supports the rejection of Liberty's attempt to circumvent those restrictions by running its scam.

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<sup>14</sup> See note 10, supra.

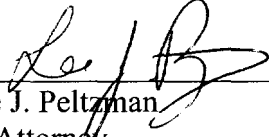
In view of the above, Orion respectfully urges that the Commission reject Liberty's November 10, 1999 amendment and direct Liberty to file with the Commission and serve on the other competing applicants copies of its September 10, 1999 Loan Agreement with Cumulus Broadcasting and its amendment to that Loan Agreement.

Respectfully submitted,

ORION COMMUNICATIONS LIMITED

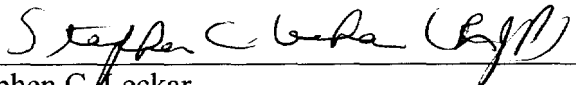
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November 22, 1999



## CERTIFICATE OF SERVICE

I, Michael S. Goldstein, secretary in the law offices of Shainis & Peltzman, Chartered, do hereby certify that on this 22nd day of November, 1999, copies of the foregoing document were sent, via first-class United States Mail, postage pre-paid, to the following persons:

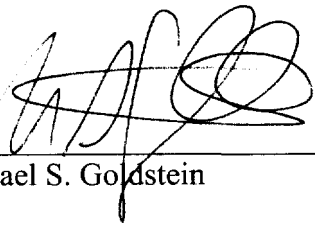
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